IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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No. 80-91

OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 80-1798

WOELKE & ROMERO FRAMING, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND CARPENTERS LOCAL 235 UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE

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## BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE

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## INTEREST OF THE AMICUS CURIAE

The Associated Builders and Contractors (hereafter ABC) is a national trade association composed of approximately 17,000 independent construction and construction supplier companies operating primarily on an open shop basis throughout the United States. ABC is founded on the "merit shop" philosophy, i.e., that the opportunity to bid and compete for construction work should be based on the ability to operate efficiently and to offer quality service at a reasonable cost. ABC contractors, therefore, do not believe success or failure in the construction industry should depend on a company's union or nonunion status.

ABC members perform the majority of their work in the commercial, industrial, and institutional areas, with commercial projects far outranking the other areas. In fact, eighty-five percent of ABC members do some commercial work. For nearly forty percent of our members, commercial construction represents one-half of their workload. Industrial and institutional construction also comprises a substantial portion of member work. The average number of workers employed by ABC firms averages forty-one per employer. Nevertheless, approximately one-half of all ABC members employ twenty or less workers, which places the typical firm squarely in the small business category.

Over eighty percent of all ABC employers work, on occasion, with union firms and three-fourths of them award between ten and thirty percent of their subcontracts to union firms.[1] The construction of many commercial and industrial projects requires the employment of multiple crafts. It is standard practice for general contractors to subcontract work to construction employers, both union and nonunion, based on a plethora of

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[1] These statistics were recently compiled by Opinion Research Corporation of Princeton, N.J., in a 1981 survey of over 2,500 ABC members.

factors such as price, quality of work, efficiency of operation, availability and geographical location of the subcontractor. The co-mingling of union and nonunion employers on the same building project, which is commonplace in the construction field, creates the "mixed" jobsite. Union signatory subcontracting clauses are aimed at alleviating the friction that sometimes occurs on "mixed" jobsites between union and nonunion employees.

As stated above, an overwhelming majority of ABC members work shoulder-to-shoulder with union firms on occasion. Broad union signatory subcontracting clauses that prevent this customary work practice, even when there is no potential for jobsite friction, will force many open shop firms, that are now awarded subcontracts by union general contractors to either sign a union contract or forego competing for this "mixed" job market. Furthermore, the open shop employer, unlike his union counterpart, must often maintain a full-time work force because they have no union hiring hall system to rely on. Broad union signatory subcontracting clauses will reduce the amount of work available to ABC members and require reductions and lay-offs of their full-time employees, causing further erosion of this nation's economy.

The Court's decision in this case — whether union signatory subcontracting clauses should be restricted in the construction industry to alleviating jobsite friction between union and nonunion employees — will largely determine to what degree open shop contractors will be able to compete and survive in the free enterprise system.

## SUMMARY OF ARGUMENT

The issue of the proper scope of Section 8(e), 29 U.S.C. § 158(e), of the National Labor Relations Act, as it relates to construction industry subcontracting clauses, was previously decided by this Court in *Connell Construction Co.* v. *Plumbers*

*and Steamfitters, Local Union 100*, 421 U.S. 66 (1975), and should have been followed by the *en banc* Court of Appeals. The mere fact that *Connell* arose from an anti-trust action and that there was no collective bargaining relationship between the union and the union general contractor in *Connell* is not of controlling significance. The *Connell* court, of necessity, had to exhaustively scrutinize Section 8(e) and its construction industry proviso to determine whether a subcontracting agreement between the parties, similar to the subcontracting clauses considered below, had the primary objective of organizing other employers or whether the provision was directed to the labor relations of the contracting employer, vis-a-vis his own employees, and thus entitled to the statutory labor exemption from the operation of the anti-trust laws.

The *Connell* court held that a similar subcontracting clause, as presented below, was not entitled to the protection of the construction industry proviso to Section 8(e), because it was not aimed at reducing jobsite friction between union and nonunion employees. Therefore, the *en banc* Court of Appeals, in finding that *Connell* was not controlling, was in error.

The legislative history behind the enactment of Section 8(e) reveals that Congress was principally concerned with curbing the pernicious effect of "hot cargo" agreements. These agreements enmeshed companies neutral to a labor dispute, between the union and some other employer, into an economic boycott of the employer that was the subject of the union's labor objectives. The construction industry proviso to Section 8(e) reserves a partial exemption to the general congressional ban on "hot cargo" agreements for construction employers and unions, when the purpose of their subcontracting clauses (hot cargo agreements) is limited in scope to the reduction of jobsite friction between union and nonunion employees. Furthermore, the legislative history behind the construction industry proviso to Section 8(e) does not reveal a congressional intent to arm

building trades unions with an unlimited "top-down" organizing weapon against construction employers, whereas, this was the very evil aimed at by Section 8(e). The pattern of collective bargaining prior to 1959 indicates that there was no standard subcontracting clause in the construction industry that would support the en banc Court of Appeals finding that "union signatory" subcontracting clauses were prevalent antecedent to the enactment of Section 8(e).

A decision by this Court that construction employers and unions can restrict the subcontracting of work to firms signatory to a particular collective bargaining agreement, even when the construction employer has no employees present at the jobsite represented by the labor organization, or at other times when there is not even a remote possibility for jobsite friction between union and nonunion employees, will force open shop employers to sign "top-down" collective bargaining agreements in order to compete for work, and will frustrate the strong federal labor policy of giving employees an unfettered right to choose their own bargaining representatives.

Construction unions already have the legitimate means to effectively organize employees and to protect their members' other interests on a construction site, without expanding the scope of the construction industry proviso to Section 8(e).

## ARGUMENT

### I. The *En Banc* Court Of Appeals Improperly Concluded That This Court's Decision In *Connell Construction Co. v. Plumbers And Steamfitters, Local 100*, 421 U.S. 616 (1975) Was Not Controlling As To The Cases Below.

This Court last examined the proper scope of Section 8(e) and its construction industry proviso in *Connell Construction Co.* v. *Plumbers and Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975). While *Connell* arose in the context of an anti-trust action, this Court of necessity had to scrutinize the legislative history and meaning behind Section 8(e) in order to determine whether a "hot cargo" agreement between a union and a general contractor was within the construction industry proviso to Section 8(e), and therefore protected by federal labor policy from the proscription and operation of the anti-trust laws. The union in *Connell* sought an agreement from a union general contractor that would have prevented the general contractor from subcontracting work to firms not yet signatory to a collective bargaining relationship with that particular union. The union did not have a collective bargaining relationship with the general contractor and specifically disclaimed any interest in representing any of the employees of the general contractor. Furthermore, the subcontracting clause would not have prevented the general contractor from subcontracting to nonunion firms not within the craft jurisdiction of that particular union, even if members of that union would have been present at jobsites conterminously with employees of nonunion contractors. Thus the subcontracting clause was not aimed at avoiding "shoulder-to-shoulder" friction between union and nonunion employees, which this Court concluded was at the heart of the construction industry proviso to Section 8(e).

> ". . . we think [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of congressional references to

> the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633.

The *Denver Building Trades* problem, simply stated, is the potential for friction created when union and nonunion employees are forced to work side-by-side at the construction jobsite. As Justice William O. Douglas stated in his dissenting opinion in *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951),

> "The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. The union was not out to destroy the contractor because of his anti-union attitude. The union was not persuing the contractor to other jobs. All the union asked was that union men not be compelled to work along-side nonunion men at the same job." 341 U.S., at 692.

Moreover, the *Connell* court did not quarrel with other court decisions it cited that have found the 8(e) proviso serves the narrow function of alleviating frictions that may arise when union men work continuously along-side nonunion men on the same construction project. *Connell, supra* at 630.

In spite of *Connell's* clear language that the primary federal labor policy underlying the 8(e) proviso was to alleviate jobsite friction, the *en banc* Court of Appeals did not adopt this "even narrower" reading of the proviso because in *Connell* the union did not purport to represent any of the interests served by the construction industry proviso since there was no collective bargaining relationship between the union and the general contractor. Therefore, the court below concluded that it was more in accord with the language of *Connell* to permit union signatory subcontracting clauses to apply to any jobsite at which an employer, who has a collective bargaining relationship with the union, is a contractor, even when there is no potential for jobsite friction.

The *en banc* Court of Appeals' reading of the scope of the 8(e) proviso not only does harm to its clear language but also ignores this Court's additional concern that unrestrained "union only" subcontracting clauses would arm unions with a broader organizational weapon than Congress intended when enacting the 8(e) proviso. The *en banc* Court of Appeals cavalierly acknowledged that unions clearly have secondary goals when they seek union signatory subcontracting agreements that include organizing the employees of nonunion subcontractors who have no connection with the primary bargaining unit employees of the union general contractor. The court below was able to justify this "top-down" organizing effect of subcontracting clauses because of the problems faced by construction unions in maintaining union wage rates and benefits such as retirement pensions and paid vacations for their members.

The *en banc* Court of Appeals found support for its theory that union subcontracting clauses are valid, even if their only purpose is to promote the union's interest in protecting its wages and benefits, in this Court's reasoning that the construction industry proviso is . . . "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there," . . . "*National Woodwork Manufacturers Assn'n* v. *NLRB*, 386 U.S. 612, 638-639 (1967).

Nowhere in *Connell*, or in any other case decided by this Court, has there been language suggesting that the "close community of interest," that the construction industry proviso preserves is the continuity of employer payments into union pension funds or the maintenance of other union benefits.

If anything, *Connell* stated a much narrower interpretation as to the "close community of interests" intended to be protected by the construction industry proviso, i.e.,

> "Local 100 . . . does not claim to be protecting Connell's employees from having to work along-side nonunion men.

> The agreement apparently was not designed to protect Local 100's members in that regard, since it was not limited to jobsites on which they were working. Moreover, the subcontracting restriction applied only to the work Local 100's members would perform themselves and allowed free subcontracting of all other work, thus leaving open a possibility that they would be employed along-side nonunion subcontractors . . ." *Connell, supra* at 631.

*Connell* is therefore unequivocal in its holding that the construction industry proviso was intended for the purpose of eliminating the "shoulder-to-shoulder" friction that results when union and nonunion employees work on the same construction jobsite. It was not designed as a tool for unions to create a "domino" organizing impact on nonunion firms who seek to gain subcontracting assignments from union general contractors, who in turn are subject to restrictive subcontracting clauses. As pointed out by this Court,

> "In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from § 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon." *Id.* at 630.

ABC agrees with this Court's restrictive view of the contruction industry proviso. We respectfully urge this Court to reject the *en banc* Court of Appeals decision that would permit union signatory subcontracting clauses to be operational at all construction locations where the signatory employer is present, even when the signatory union has none of its members present at a jobsite, where nonunion employees are working, so as to create the potential for union-nonunion friction among employees.

**II. The Legislative History Of Section 8(e), 29 U.S.C. § 158(e), And The Actual Conditions Existing In The Construction Industry Prior To 1959 Do Not Support The Decision Below As To The Legitimate Scope Of Union Signatory Subcontracting Clauses.**

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. A union signatory clause is normally secondary in nature, *Griffith Co.* v. *NLRB*, 545 F.2d 1194, 1199 (9th Cir., 1976), cert. denied, 434 U.S. 854 (1977). Section 8(e) was aimed at strengthening the prohibition in Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), against secondary activities, by forbidding agreements which might be used to circumvent the section's ban on the use of economic coercion for secondary objectives. *Connell, supra* at 628. However, the prohibition in Section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and a more limited exemption for the construction industry. Respondents below argue that the construction industry proviso was meant to preserve in the construction industry the law as it existed, prior to the enactment of section 8(e). Although the garment industry proviso was supported by detailed explanations in both Houses of Congress, this Court found that the construction industry proviso was explained only by rare references to the "pattern of collective bargaining in the industry" (remarks of Senator Kennedy). Id. at 628. Legislative references indicate that Congress may have intended the construction industry proviso to maintain the status quo of the law, as to union subcontracting clauses, as it was understood in *Carpenters Local 1976* v. *NLRB (SandDoor)*, 357 U.S. 93 (1958). See *Connell* 421 U.S. at 629 (fn. no. 8). However, the agreement in *Sand Door* involved the use of nonunion material on a construction jobsite, not a subcontractor provision. Thus, the lawfulness of union signatory clauses such as those challenged was not determined in *Sand Door*. *Pacific Northwest*

*Chapter of the Associated Builders and Contractors, Inc., et al.* v. *NLRB, et al.*, 609 F.2d 1341, 1349 (9th Cir. 1979).

Even assuming there was a pattern of collective bargaining, as to subcontracting clauses, existing prior to 1959 when Section 8(e) was enacted, it is unclear what the nature of the "pattern" was.[2] It is obvious that Congress did not intend to ratify all union subcontracting clauses in existence prior to 1959, because the proviso's protection is limited to jobsite work. This eliminated the legality of some clauses that were in evidence prior to 1959, which boycotted the subcontracting of non-jobsite work as well.

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[2] "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic, i.e., many different practices that vary with the union and the geographic area involved. To say that Congress intended to preserve this 'mosaic pattern' would lead to the conclusion that the legality of a 'particular union' subcontracting clause today depends on whether the signatory union in the particular geographic area had such a clause in 1959. Absent express statutory language or clearly compelling legislative history, one would not infer that Congress intended to have different 8(e) results for different geographic areas and different construction unions, depending upon practices that existed 17 years ago.

In summary, the evidence does not clearly establish a 'pattern of collective bargaining' that would support a conclusion that Congress intended to sanction 'particular union' subcontracting clauses. Further, even assuming that the evidence did establish such a pattern of collective bargaining, the 'bare references' in the legislative history to the 'pattern of collective bargaining' do not, standing alone, indicate that Congress intended to freeze forever the *status quo* as it existed in 1959. The strong Section 7 policy of giving employees an unfettered right to change bargaining representatives and the Congressional distaste for 'top-down organizing' both point away from a policy of giving particular unions a preferred status in perpetuity." NRLB *General Counsel's Memorandum;* No. 75-57, p. 16 (1976).

While Congress intended to permit union signatory subcontracting clauses in the construction industry, as an exception to the general ban on hot cargo agreements, its main purpose in enacting the proviso was to permit these clauses as a means of alleviating the frictions that may arise when union men work continuously along-side nonunion men on the same construction site. *Drivers; Salesmen, etc., Local 695* v. *NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966). Although the legislative history of the proviso is often vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. Where the employees of some contractors are union members and the employees of others are not, there is potential, or so Congress believed, for jobsite conflict. Of utmost significance is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with union craftsmen. This is the problem Congress was primarily concerned with addressing through the proviso. *Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), *Connell, supra* at 630

Thus the purpose of the proviso was to allow unions and construction employers to avoid the problems attendant to co-mingling union and nonunion workers at the same jobsite.

Respondents below have argued that the construction industry proviso authorizes subcontracting agreements with contractors and in some circumstances with "stranger" contractors, without a collective bargaining relationship with the union, not limited to any particular jobsite. This Court has concluded that it is highly improbable that Congress intended such a result. "One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7), which restricts primary recognition-

al picketing and by further tightening section 8(b)(4)(B) of the Act, which prohibits the use of most secondary tactics in organizational campaigns." *Id.* at 632.

The construction industry proviso, though an exception to the section's general proscription, should not be interpreted to frustrate that objective.

Allowing union subcontracting clauses to be operational at all times and at all locations would also seriously undermine Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, which provides that employees have the right to engage in or refrain from engaging in any and all union activity. In addition if employees choose to unionize, they have the right to bargain "through representatives of their own choosing." A union signatory subcontractor clause operates to force non-union firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. Thus, the union signatory subcontracting clauses considered here are exactly the kind of tool for "top-down" organizing which this Court condemned in *Connell*.

### III. Not Restricting Subcontractor Agreements To Jobsites Where Actual Friction May Occur Between Union And Nonunion Workers Will Have A Substantially Adverse Impact On The Open Shop Contractor's Ability To Compete For Construction Work.

Under the court below's holding, union signatory subcontractor clauses that require the contractor to subcontract work only to employers that have agreements with particular unions, are within the parameters of Section 8(e) and can be forced on firms involuntarily, by means of union picketing, as long as they are sought as part of a "collective bargaining relationship" between the parties. The *en banc* Court of Appeals opinion fundamentally departs from the principles set down in *Connell* and ignores and conflicts with the underlying federal labor

policy behind the construction industry proviso to Section 8(e) of the National Labor Relations Act.[3] In so doing, the *en banc* Court of Appeals decision undermines the ability of open shop contractors to compete fairly and freely with his union contractor counterpart for a share of the construction industry marketplace.

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[3] ". . . the fact that a clause requires the subcontractor to have agreements with particular unions is at least some indication that the signatory union's aim is to encourage subcontractors to recognize those particular unions, i.e., to organize from the 'top-down' these subcontractors. The inference is stronger if the 'favored' unions are the signatory union itself and/or fellow members of a trades council.

In addition, as indicated *supra*, Congress expressed a strong distaste in 1959 for 'top-down organizing.' If the proviso were construed to permit a contractual clause requiring that subcontractors be parties to agreements with particular unions, the foreseeable consequence would arguably be that subcontractors would be encouraged to enter into collective bargaining agreements with these particular unions. The subcontractors would realize that their eligibility to obtain subcontractors from the signatory general contractor would be dependent upon their entering into such collective bargaining agreements. In this fashion, the 8(e) proviso would encourage 'top-down organizing,' the very vice with which Congress was concerned in 1959.

Moreover, if the 8(e) proviso were construed to permit 'particular union' subcontracting clauses, there would be a negative impact on the exercise of Section 7 rights. If a subcontractor had a collective bargaining agreement with one of the 'particular unions,' his employees would be discouraged from ever changing bargaining representatives. Those employees would realize that a change in representation from the 'particular union' to some 'non-favored' union would mean that their employer would lose eligibility to bid on contracts with the signatory general contractor and this would mean a consequent loss of work for them. By 1959, the basic right of employees to freely choose and change bargaining representatives had existed for 24 years. It would be argued that Congress did not intend that the 8(e) proviso would operate to impede or impair the exercise of these well-established and important statutory rights." NLRB *General Counsel's Memorandum;* No. 75-57, p. IV, (1976).

Petitioners recognize that unions have been accorded both a statutory exemption and a non-statutory exemption from the operation of the anti-trust laws because of federal labor policy favoring union concerted activity that is aimed at establishing uniform wages and working conditions through collective bargaining agreements. See *Meat Cutters Local 189* v. *Jewel Tea Co.;* 381 U.S. 676. However, these exemptions do not give unions and employers the right to combine for the purpose of directly restraining competition in the business market. *Allen Bradley Co.* v. *IBEW Local 3,* 325 U.S. 798, 811. The union-signatory subcontracting clauses considered below, permit construction unions to place a direct restraint on a substantial segment of the construction market and impermissably boycott the nonunion contractor and his employees from competing for work they have traditionally performed. This Court correctly stated the pernicious effect and restraint on business competition created by broad union signatory subcontracting clauses in the construction industry.

> "In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the anti-trust laws strive to protect." *Connell, supra* at 633

Thus, federal labor policy does not require that unions have an unlimited privilege to impose restraints on those that employ its members. The inclusion of union signatory subcontracting clauses in collective bargaining agreements executed between labor organizations and union general contractors compels non-

union subcontractors to submit involuntarily to the unionization of their employees.[4]

The toleration of this undesirable consequence is unjustified in light of the alternative contract provisions which unions can employ to restrict the subcontracting of work. Many of organized labor's objectives can be protected by the execution of work preservation agreements with union general contractors. Under such a clause the general contractor cannot subcontract work which has been traditionally performed by employees covered by the collective bargaining agreement. In addition, the general contractor can be dissuaded from awarding contracts to nonunion employers by the execution of a "union standards" clause. An agreement of this nature provides that work can be subcontracted only to those employers which

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[4] The "top-down" organizing impact of the union signatory subcontracting clause, that is neither limited to particular jobsites or to the elimination of jobsite friction, can best be demonstrated by using a hypothetical example: Union general contractor A has a subcontracting agreement with union X limiting the subcontracting of work to employers with collective bargaining agreements with union X or some other union in the local Building Trades Council. General contractor A subcontracts an entire project, requiring five different types of subcontractors, to non-union employers. All five non-union employers (B, C, D, E and F) agree to sign a collective bargaining agreement with union X or another member of the building trades council in order to work on the project. Each one of these non-union subcontractors is engaged in five other projects at a total of twenty-five different locations. None of the general contractors at these twenty-five other projects has an agreement with union X or with any other crafts in the local trade's council. Therefore, in order to protect the "community of interests" of the employees of employers B, C, D, E and F, union X demands and receives from these general contractors signed collective bargaining agreements, which also contain union signatory subcontracting clauses. These twenty-five general contractors, in turn, are told by union X that they must remove all non-union subcontractors from any other projects they are involved in or face a breach of contract action. Thus, the seed of just one union signatory subcontracting agreement has given union X and the Building Trades Council a "windfall" organizational gain.

observe the equivalent of union wages, hours, and conditions of employment. The successful negotiation of such a provision prevents a nonunion subcontractor from taking advantage of the potentially lower wage demands of his employees. Therefore, the labor policies of the various employers will not be determinative in the computation of bids for the general contractor. To this extent, an economic parity between all subcontractors is achieved, and union employers are not disadvantaged in acquiring contracts for construction work. In addition, unions can picket to gain both work preservation and union standard clauses in their agreements with employers because they are primary in nature, not secondary. See *National Woodwork, supra*.

Not only do work preservation clauses and union standards clauses effectively restrict the right of general contractors to subcontract work, but unlike union signatory subcontracting clauses, neither of these provisions permit the union to achieve the secondary objective of forcing a nonunion subcontractor to change his labor policy in order to compete for work. Furthermore, such a restrictive interpretation of the construction industry proviso to Section 8(e), by this Court, would not unduly hamper union pursuit of employment opportunities for their members, while preserving to the employees of the nonunion subcontractor the freedom to choose their own bargaining representative which is at the very heart of the National Labor Relations Act. Moreover, Respondents below exaggerate the alleged difficulties of organizing open shop contractors. Since open shop contractors do not rely on a hiring hall system of employment, they must of necessity maintain stable work forces that are no less accessible to union solicitation, at work or in their homes, than industrial or retail employees. Construction unions are also free to engage in organizational picketing of the nonunion contractor at the jobsite within the proscribed limits of Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7). Member firms of this association have

been successfully organized in the past by means of primary recognitional picketing at the jobsite. In many instances, because these members maintained steady workforces and generally only bid on construction work in a relatively small geographical area, their duty to bargain with the successful union continued to exist even if the job on which they were originally organized ended.

In addition, publicity picketing under section 8(b)(7)(C) of the NLRA, 29 U.S.C. § 158(b)(7)(C), to protect area standard wages and working conditions, often results in union acquisition of an agreement from the open shop contractor to guarantee these standards to his employees. This technique of protecting local wages and working conditions is particularly effective on mixed jobsites where nonunion and union contractors are both employed. The union knows that all picket lines, even legal publicity picket lines, inherently encourage union members on the mixed jobsite to engage in work stoppages or slow-downs in sympathy with the picketing union. The open shop contractor, operating as a subcontractor on a mixed jobsite, is in turn, aware of the impact a properly conducted publicity picket line has on a union general contractor. The open shop contractor is therefore under tremendous pressure to placate the picketing union by agreeing to pay the area/union wage standard to his employees. The advantage of publicity picketing is that it is exempt from the restrictions imposed on recognitional picketing by Section 8(b)(7) of the Act. Because a properly conducted publicity picket line can be maintained indefinitely, it affords unions the weapon they need to achieve most of their legitimate labor goals. Federal law also protects "prevailing" area wages and benefits on all federally funded or federally assisted construction projects.[5] In most cases "prevailing" is synonomous with the union scale of wages and benefits.

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[5] Davis-Bacon Act, 40 U.S.C. § 276(a). Most states have enacted "little" Davis-Bacon Acts that protect prevailing wages and benefits on state funded or assisted construction projects.

In combination with work preservation clauses and union standards clauses, the primary picketing allowed under the National Labor Relations Act provides ample protection for construction unions to protect the community of interests of their members. To add to these the right to picket for union signatory subcontracting clauses, that do not serve to eliminate shoulder-shoulder jobsite friction between union and nonunion employees,[6] but rather provide the union with a brutal top-down organizing weapon, will give craft unions exclusive control over all construction work within their jurisdictions and further serve to deprive nonunion employees of the freedom to choose their own bargaining representatives.

As stated above, over eighty-five percent of all ABC members, on occasion, work with union firms and three-fourths of ABC members award up to thirty percent of their subcontracts to union firms.

The foreseeable consequence of this Court's sanctioning of union signatory subcontracting clauses, that are not aimed at preventing jobsite friction, is to eliminate the longstanding historical practice of mixed construction jobsites and to exclude competition based on efficiency of operation, the evil castigated by this Court in *Connell*. Such a signal sent forth by this Court would sound the death knell for the open shop contractor in an already depressed economy.

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[6] The *amicus* agrees with the position of Petitioners that section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), was intended to allow only voluntary pre-hire agreements in the construction industry and that picketing to force employers to enter into 8(f) contracts, containing union signatory subcontracting clauses, is illegal conduct that this Court should proscribe.

## CONCLUSION

For the reasons stated above, as well as those presented by Petitioners, the Associated Builders and Contractors urges this Court to reverse the below decision of the en banc Court of Appeals.

Respectfully submitted,

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